

1 DAVID L. ANDERSON (CABN 149604)
2 United States Attorney
3 SARA WINSLOW (DCBN 457643)
Chief, Civil Division
3 ADRIENNE ZACK (CABN 291629)
Assistant United States Attorney
4 450 Golden Gate Avenue, Box 36055
5 San Francisco, California 94102-3495
6 Telephone: (415) 436-7031
Fax: (415) 436-6748
adrienne.zack@usdoj.gov
7 Attorneys for Defendant

8
9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 NATIONAL PUBLIC RADIO, INC., and ERIC) CASE NO. 4:18-cv-5772-DMR
14 WESTERVELT,)
15 Plaintiffs,) DEFENDANT'S RESPONSE TO MOTION FOR
v.) ORDER OF CLARIFICATION REGARDING
16) SCOPE OF FOIA REQUEST
17 UNITED STATES DEPARTMENT OF)
18 VETERANS AFFAIRS,)
19 Defendant.)
20)
21)
22)
23)
24)
25)
26)
27)
28)

17 Pursuant to the Court's Order of December 4, 2019, ECF No. 43, Defendant, U.S. Department of
18 Veterans Affairs ("VA"), submits this response to Plaintiffs' motion for an order of clarification
19 regarding the scope of Plaintiffs' Freedom of Information Act ("FOIA") request. The March 29, 2018
20 FOIA request submitted by Plaintiff Westervelt, when read in its entirety, does not request the entire
21 email mailbox of Ms. Leslie Wiggins, and Plaintiffs may not expand the scope of their request to include
22 those records during this litigation.

23 **I. The FOIA Request Does Not Request Ms. Wiggins' Email Mailbox.**

24 Plaintiffs' FOIA request, when read as one document, cannot be reasonably interpreted as
25 encompassing Ms. Wiggins' individual email mailbox. The thrust of Plaintiffs' request is for
26 investigation and complaints, not the records of individual VA staff that do not conduct investigations or
27 handle complaints. Although the FOIA requires agencies to construe FOIA requests liberally, it does
28 not require an agency to search "beyond the four corners of the request" or "divine a requester's intent."

1 *Am. Chemistry Council, Inc. v. U.S. De't of Health & Human Servs.*, 922 F. Supp. 2d 56, 62 (D.D.C.
 2 2013) (citations and quotations omitted). Rather, an unclear request may be reasonably interpreted by
 3 the agency when determining what records for which to search. *See Wilson v. U.S. Dep't of Transp.*,
 4 730 F. Supp. 2d 140, 154–55 (D.D.C. 2010), *aff'd*, No. 10-5295, 2010 WL 5479580 (D.C. Cir. Dec. 30,
 5 2010) (finding that a request for “all EEO complaints” was reasonably interpreted to mean formal
 6 complaints); *Adamowicz v. IRS*, 552 F.Supp.2d 355, 362 (S.D.N.Y. 2008) (finding that a request for
 7 documents pertaining to a tax audit did not include documents regarding the appeal of the audit). The
 8 VA has properly interpreted Plaintiffs’ request for “records . . . relating to . . . [a]ny and all
 9 investigations or correspondence that mentions the name of Ms. Leslie Wiggins, Network Director of
 10 VISN 7” to not include Ms. Wiggins’ actual email mailbox.

11 Plaintiffs appear to argue that “correspondence that mentions the name of Ms. Leslie Wiggins”
 12 includes Ms. Wiggins’ email mailbox. ECF No. 1-1 at 2. A reasonable interpretation of this language
 13 does not include the mailbox of Ms. Wiggins’ herself, or as Plaintiffs describe in their motion “emails
 14 sent or received by Ms. Leslie Wiggins.” ECF No. 44 at 1. The verb “mention” is defined as to “refer
 15 to briefly and without entering into detail.” *Mention*, *v.*, OED Online, Oxford University Press,
 16 December 2019, www.oed.com/view/Entry/116562. The noun “mention” means “the action or an act of
 17 referring to, remarking upon, or introducing the name of a person or thing in spoken or written
 18 discourse, often incidentally and as not necessarily essential to the discussion.” *Mention*, *n.*, OED
 19 Online, Oxford University Press, December 2019, www.oed.com/view/Entry/116561. The reasonable
 20 understanding of communications that “mention” the name of an individual would therefore not include
 21 the emails sent by that person. Instead, it suggests communications about that person by others.
 22 Further, the subpart of the request is for “all investigations and correspondence that mentions” Ms.
 23 Wiggins. ECF No. 1-1. When part three is read as a whole, it is even more apparent that the request
 24 was reasonably interpreted to include only records that referred to Ms. Wiggins’ name that were created
 25 by other parties.

26 If Plaintiff Westervelt in fact sought Ms. Wiggins’ emails in the FOIA request, it would have
 27 been simple to request those records.¹ A request for “all emails sent or received by Ms. Leslie
 28

¹ Defendants do not dispute that Ms. Wiggins’ emails would be considered agency records under FOIA.
 DEF. RESP. TO MOT. FOR CLARIFICATION RE SCOPE

1 Wiggins,” as Plaintiffs have now described, would have been clear and sufficient. And although a
 2 requester cannot be expected to know the details of how an agency organizes its records, a request for an
 3 email mailbox does not necessarily require specialized knowledge about agency systems. *See Inst. for*
 4 *Justice v. Internal Revenue Serv.*, 941 F.3d 567, 572 (D.C. Cir. 2019) (providing the example that a
 5 request for emails “would not fail because the request was for emails ‘in’ an Outlook inbox rather than
 6 ‘accessible through’ Outlook”). Moreover, Plaintiffs are sophisticated and experienced FOIA
 7 requesters, a reporter and national news organization, who can be expected to submit FOIA requests that
 8 set forth the requested documents with the required reasonable description. *See* 5 U.S.C. § 552(a)(3)(A).

9 Finally, to the extent that the motion seeks to expand Plaintiffs’ FOIA request in the midst of this
 10 litigation, such an expansion is improper. “[A] FOIA plaintiff may not expand the scope of his request
 11 once his original request is made.” *Coss v. United States Dep’t of Justice*, 98 F. Supp. 3d 28, 34 (D.D.C.
 12 2015). The Court should reject any attempt to expand Plaintiffs’ request beyond its original terms and
 13 find that it does not encompass “all emails sent or received by Ms. Leslie Wiggins.”

14 **II. The VA Properly Construed the FOIA Request As One Directed Only to OAWP.**

15 Plaintiffs argue that VA improperly limited their FOIA request to the Office of Accountability
 16 and Whistleblower Protection (“OAWP”), which does not have control over Ms. Wiggins’ email
 17 mailbox, but this question need not be decided to resolve the current dispute between the parties. In
 18 their motion, Plaintiffs request a determination regarding whether the VA must “review and produce any
 19 emails sent or received by Ms. Leslie Wiggins.” ECF No. 44 at 1. Even if the VA had directed parts
 20 three and four of the request to another part of the VA for fulfillment, the other component would not
 21 have found Ms. Wiggins’ individual email mailbox to be covered by the request for the reasons
 22 discussed above. The cases cited by Plaintiffs regarding improper narrowing of a request by an agency
 23 or inadequate search are therefore inapposite to the question at issue here. *See* ECF No. 44 at 3-4.

24 However, even considering Plaintiffs’ arguments regarding the routing of the request, a facial
 25 examination of the FOIA request shows that the VA reasonably interpreted the request as directed only
 26 to OAWP.² First, the VA processes FOIA requests in a decentralized manner. The regulations in effect
 27

28 ² Because the issue here is purely legal and limited in scope, Defendant does not submit declarations as
 it might in the context of a full motion for summary judgment.

1 in March 2018 instructed requestors to “write directly to the FOIA Officer for the VA component that
 2 maintains the records.” 38 C.F.R. § 1.554 (2018). The regulations went on to say that “[i]f the requester
 3 is not sure where to send the request, he or she should seek assistance from the FOIA Contact for the
 4 office believed to manage the programs whose records are being requested or send the request to the
 5 Director, FOIA Service (005R1C), 810 Vermont Avenue, NW., Washington, DC 20420, who will refer
 6 it for action to the FOIA contact at the appropriate component.” *Id.* Plaintiff Westervelt submitted the
 7 request to the email mailbox for FOIA requests at the VA Central Office (“VACO”). ECF No. 44 at 12.

8 Contrary to Plaintiffs’ assertions, the request, when taken as a whole, is clear that it was directed
 9 to only OAWP. The subject line of Plaintiff Westervelt’s email reads “FOIA Request OAWP from NPR
 10 News.” ECF No. 44 at 12. The body of the email does not indicate any uncertainty regarding which
 11 component would be the appropriate entity to address his request. *Id.* The address line of the request
 12 reads “U.S. Department of Veterans Affairs, Office of Accountability and Whistleblower Protection.”
 13 ECF No. 1-1. And although it is addressed to “Dear Veterans Affairs FOIA Officer,” the FOIA officer
 14 for OAWP is also a VA FOIA officer. It is reasonable that the VACO interpreted this request as
 15 directed only to OAWP and merely performed a routing function to OAWP when it was clear that the
 16 request was directed to OAWP alone.

17 When an agency processes its FOIA requests in a decentralized manner, as set out in its FOIA
 18 regulations, and a request is sent to one component of that agency, the agency acts appropriately when it
 19 limits its search to the records in the component’s possession. *See Hussain v. U.S. Dep’t of Homeland*
 20 *Sec.*, 674 F. Supp. 2d 260, 265 (D.D.C. 2009). For example, in *Hussain*, the requestor submitted a
 21 request to United States Citizenship and Immigration Services (“USCIS”), a component of the
 22 Department of Homeland Security (“DHS”), for his alien registration file. *Id.* The court found that
 23 certain materials that were located in the requestor’s detention file, maintained by Immigration and
 24 Customs Enforcement, another component of DHS, were properly excluded from the agency’s search
 25 because the request was only directed to USCIS. Here, the VA FOIA regulations “put[] the burden on
 26 the requesting party to direct his request to the [VA] component from which records are sought.”
 27 *Skurow v. U.S. Dep’t of Homeland Sec.*, 892 F. Supp. 2d 319, 328 (D.D.C. 2012) (interpreting similar
 28 language in DHS FOIA regulations). Plaintiffs’ request was only directed to OAWP, and therefore it is

1 proper for Defendant's search to be limited to that component of the VA.

2 The FOIA request at issue here is distinguishable from that at issue in *The Few, the Proud, the*
 3 *Forgotten v. United States Dep't of Veterans Affairs* ("TFTPTF"), 254 F. Supp. 3d 341, 348 (D. Conn.
 4 2017). In that case, the FOIA request was addressed to two components of the VA, the Veterans
 5 Benefits Administration and the Veterans Health Administration on its face. *Id.*; Complaint at Exhibit
 6 A, *TFTPTF*, 254 F. Supp. 3d at 341 (No. 3:16-cv-00647), ECF No. 1. The components then determined
 7 how to divide the request, and the court found that this division did not result in an adequate search.
 8 *TFTPTF*, 254 F. Supp. 3d at 354. Here, Plaintiffs' request was only directed to OAWP, and VACO
 9 properly forwarded the request onward to OAWP. Plaintiffs' reliance on *TFTPTF* is thus inapposite.
 10 *Truitt v. Department of State*, 897 F.2d 540, 543 (D.C. Cir. 1990), is also unpersuasive because it deals
 11 with a circumstance in which an agency improperly limited a request based on a follow-up letter from
 12 the requester providing more detail regarding the request. Here, there have been no following
 13 communications of a similar manner.

14 Finally, if parts three and four of the FOIA request are construed to encompass the entire VA as
 15 Plaintiffs now advocate, they would require the VA to identify every employee (such as doctors, nurses,
 16 and administrators) that might have talked about Ms. Wiggins or Mr. McDivitt in their correspondence
 17 since 2014. Such a request is not proper under FOIA, which requires that requests reasonably describe
 18 the records sought so that an employee can locate the records "with a reasonable amount of effort."
 19 *Marks v. U.S. (Dep't of Justice)*, 578 F.2d 261, 263 (9th Cir. 1978); *see also Am. Fed'n of Gov't*
 20 *Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (rejecting a
 21 request that would require the agency to locate every file of a certain type in every office as requiring an
 22 unreasonably burdensome search). Requiring a FOIA officer to determine *every* VA employee who
 23 might have mentioned Ms. Wiggins' or Mr. McDivitt's in correspondence so that their records could be
 24 searched entails an unduly burdensome search. Parts three and four of Plaintiffs' request regarding
 25 correspondence are therefore improper FOIA requests if construed to encompass all of the VA.

26 For the foregoing reasons, Defendant respectfully requests that the Court find the FOIA request
 27 may not be reasonably interpreted to include any email sent or received by Ms. Wiggins and deny
 28 Plaintiffs' motion.

1 DATED: December 18, 2019

Respectfully submitted,

2 DAVID L. ANDERSON
3 United States Attorney

4 /s/ Adrienne Zack
5 ADRIENNE ZACK
6 Assistant United States Attorney

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for Defendant